Supreme Court of Appeals of Virginia.

SPRINKLE *v.* HAYWORTH ET AL.[1]

Testator devised to his wife *absolutely* all his estate, real and personal. The wife died two days after *his* death, intestate. Bill is filed by testator's heirs and next of kin to set up a *parol agreement* between testator and his wife, that, at the death of wife, the property was to be equally divided between the two families. *Held*, unless *fraud* is alleged and proved, no such trust can be set up by *parol*.

The limitation over, being of what was left at death of wife, could not be enforced, even if it had been expressly limited on the face of the will, as such a limitation would be repugnant to the absolute devise and void.

APPEAL from the Circuit Court of Smyth county.

A. B. Sprinkle, the testator, and his wife, having by their joint industry amassed quite a large fortune, and never having had any children, it was their wish and intention, often expressed, that whatever of their property might be left unexpended and undisposed of at the death of the survivor of them, should be divided into moieties, one of which should go to the family or collateral heirs of the husband, and the other to the family or collateral heirs of the wife. The husband died on the 19th of January 1870. The wife survived him only a day or two; having died on the 21st of January 1870. She appeared to have been in usual health at the time of his death, but almost at once became paralyzed, and remained so, and generally unconscious, until her death.

By his will he left his entire estate to his wife absolutely. She died without leaving a will, not having been in a condition to make one in the short interval between his death and hers.

The bill in the present case was then filed by the heirs at law and next of kin of the husband against the heirs at law and next of kin of the wife, for the purpose of setting up and enforcing the alleged parol understanding and agreement between the husband and wife, for the equal division of the estate of the husband left at the death of the wife, between their two families as aforesaid.

Some of the defendants filed their answers to the bill; in which they denied that there was any such understanding and agreement between said Sprinkle and wife.

The court decreed that plaintiffs were not entitled to recover and would then have dismissed the bill; but it appearing that the property had been rented out under the order of court, and that

[1] We are indebted to Mr. *Gilmore*, counsel for the appellees, for the report of this case.—ED'S. AM. LAW REG.

the transaction on that account remained unsettled, the cause was retained for the purpose of such settlement, whereupon plaintiffs took this appeal.

R. A. Richardson and *J. W. & J. P. Sheffey*, for the appellants, cited Perry on Trusts, sects. 74, 75, 77, 82, 96; Sanders on Uses 14, 218, (2 Am. edit.); *Fleming* v. *Donohue*, 5 Ohio 250; *Bank of United States* v. *Carrington*, 7 Leigh 576; *Walraven* v. *Lock*, 2 P. & H. 549; 2 Story's Eq. Juris., sects. 20, 32, 44, 57, 781; 1 Blackst. Comm. 92; 3 Greenleaf on Ev., sect. 365; *Oldham* v. *Litchford*, 2 Vern. 506; *Drakeford* v. *Wilks*, 3 Atk. 539: *Podmore* v. *Gunning*, 2 Sim. 644; *Barrell* v. *Hanrick*, 42 Ala. 60.

John W. Johnston and *James H. Gilmore*, for appellees, cited *Wright* v. *Puckett*, 22 Gratt. 374; *Pierce's Heirs* v. *Catron*, 23 Grattan 597; Browne on Statute of Frauds, sects. 84, 94, 96; Perry on Trusts, sect. 94, p. 65; Gilbert's Forum Romanum by Tyler 328, 329; *Hare* v. *Shearwood*, 1 Ves. 241; *McCormick* v. *Grogan*, 4 English and Irish Appeals (1869–70) 82; *Devenish* v. *Baines*, Finch's Prec. in Chanc., case 3, p. 5; Redfield on Wills, part 1, sect. 39, pl. 6, letter *d*, top of page 546–7; Ibid, sect. 38, pl. 39, pp. 527, 528; Greenleaf on Ev., vol. 1, sects. 289, 290; Perry on Trusts, sect. 115, pp. 88, 89; *May* v. *Joynes*, 20 Gratt. 692.

The opinion of the court was delivered by

MONCURE, President.—There never was a will more plainly written, or one on the face of which there was less room for doubt or difficulty in the construction of it, than the one we now have before us. The language of the second clause is: "I will and bequeath to my beloved wife, Phœbe, all my estate of which I may die possessed, both real and personal, of every description whatsoever; she having aided me in making all that I have. My desire and will is that she shall own, absolutely, everything that I may die possessed of." Could language be more comprehensive or emphatic to invest the wife with the largest possible interest in, and power over, the estate of the husband? But to make it still more plain, if possible, the testator proceeds in the last clause to say: "As my wife is hereby made my heir and sole devisee, I hereby constitute and appoint her the executrix of this my last will and testament, and desire that she shall not be required to give any official bond."

And yet, plain as is this written will, the plaintiffs contend that it ought not to be carried into effect as it is written; that there was a parol understanding and agreement between the husband and wife, in virtue of which the plaintiffs, his heirs at law and next of kin, are entitled to one moiety of the estate left at his death.

There could be no valid and binding agreement between husband and wife, as she was not a competent contracting party. Suppose there was in fact such an understanding between them as the plaintiffs contend for; could effect be given to it, contrary to the plain and express language of the written will?

To give it such effect, would seem to be clearly inadmissible, for several reasons; First, because, by the common law, it is a general rule that a written instrument cannot be varied or contradicted by parol evidence; and there is nothing in this case to make it an exception to the general rule; Secondly, because such an effect would be contrary to the spirit and true intent and meaning of the Statute of Frauds, Code, p. 985, ch. 140, sect. 1. And, Thirdly, because it would be contrary to the Statute of Wills, Code, p. 887, ch. 112, sect. 1; Id., p. 910, ch. 118, sect. 4; which declares, that "no will shall be valid unless it be in writing, and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, unless it be wholly written by the testator, the signature shall be made, or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator; but no form of attestation shall be necessary." And sect. 8th; which declares that "no will or codicil, or any part thereof, shall be revoked, unless under the preceding section (in regard to revocation by marriage), or by a subsequent will or codicil, or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is required to be executed, or by the testator, or some person in his presence and by his direction, cutting, tearing, burning, obliterating, cancelling or destroying the same, or the signature thereto, with the intent to revoke." It would be strange if, after all this care taken by the legislature to prevent fraud in the making and revocation of wills, a will, solemnly made in strict and literal pursuance of all the requisitions of the statute, could be

annulled and destroyed by loose declarations of the testator, testified to chiefly by interested parties.

A great deal was said in the argument about the omission in our statute of the 7th sect. of the English Statute of Frauds, which declares, that, " all declarations or creations of trust and confidence of any lands, &c., shall be manifested and proved by some writing signed by the party," &c., and it was argued that while under the English statute, such a trust as is attempted to be set up in this case would be invalid, it is valid in this state, for the reason aforesaid.

Certainly a resulting trust is not even within the English Statute of Frauds, and of course is not within ours. Indeed the 8th sect. of the English statute, which is also omitted in ours, expressly excludes resulting trusts from the operation of the statute. The case of the *Bank of U. S.* v. *Carrington, &c.*, 7 Leigh 566, referred to in the argument, was a case of resulting trust. There are other trusts not strictly coming under the denomination of resulting trusts, which are not within the statute. TUCKER, P., enumerates many of them, in his opinion in the case just cited. And in 1 Lomax Dig., top page 233, all these trusts are considered under the denomination of " implied, resulting and constructive trusts." For peculiar reasons they are excluded from the operation of the statute.

But without attempting to define these several trusts, or to give the reason why they are not embraced within the Statute of Frauds, or to state the effect, if any, of the omission in our statute of the 7th sect. of the English Statute of Frauds, we think we can safely say, that even under our Statute of Frauds, if there were no other statute or law to prevent it, such a parol understanding or agreement as is set up in the bill, however well proved it may have been, would be insufficient to contradict or invalidate a will so plainly written as is the will in this case. It could not have that effect as a parol declaration or creation of trust, for to give it such an effect would be to subvert the statute. The most solemn wills and deeds could then be annulled by loose parol declarations under the name of trusts. The danger of admitting such declarations for such a purpose, was demonstrated in *Cox, &c.* v. *Cox*, decided by this court a few days ago. Even in the case of a resulting trust, the proofs ought to be very clear, if the trust does not arise on the face of the deed itself. Opinion of BROCKENBROUGH, J., in the *Bank of U. S.* v. *Carrington, &c.*, 7 Leigh 576, and the cases cited by him.

We do not mean to admit, however, that there is any difference in effect, between the English Statute of Frauds and ours arising from the omission in the latter of the 7th and 8th sects. of the former. That is a question which is unnecessary, and not intended to be decided in this case.

However that may be, we think the Statute of Wills, as before shown, plainly forbids that a parol will, whether in the form of a trust or otherwise, shall be set up and established, especially when there is a written will to the contrary, which has been executed and established in strict pursuance of the statute.

To be sure *fraud* may have the effect of setting aside a deed or will, or converting a grantee or devisee into a trustee for the benefit of others. The fraud which suffices to lay a foundation for such a trust is not simply that fraud which is involved in every deliberate breach of contract. The true rule seems to be, that there must have been an original misrepresentation, by means of which the legal title was obtained, an original intention to circumvent, and get a better bargain by the confidence reposed. Thus, as has been held in many cases, if a man procure a certain devise to be made to himself by representing to the testator that he will see it applied to the trust purposes contemplated by the latter, he will be held a trustee for those purposes. Brown on the Statute of Frauds, § 94. See also Gilbert's Forum Romanum 328–9. There is a very recent case of the very highest authority in the English books, which was referred to in the argument of this case by the counsel for the appellees, and which very strongly illustrates the law on the branch of the subject we are now considering. We mean *McCormick* v. *Grogan*, decided by the House of Lords in 1869, and reported in the Law Reports, English and Irish Appeal Cases, vol. 4, p. 82. The Court of Appeal in Ireland had reversed a decretal order of the Lord Chancellor there, and the House of Lords affirmed the decision of the Court of Appeal. It does not appear that there was any dissent from that decision in the House of Lords. Lord Chancellor HATHERLEY and Lord WESTBURY delivered *seriatim* opinions in the case, and Lord CAIRNS expressed his entire concurrence in their opinions. We will have occasion to refer to that case again. We will now notice only so much of it as relates to the branch of the subject we are now considering. The Lord Chancellor, after stating several cases in which a devisee had been held to be a trustee, upon parol proof of a fraud committed by him in procuring the devise, thus proceeds: "But this

doctrine evidently requires to be carefully restricted within proper limits. It is in itself a doctrine which involves a wide departure from the policy which induced the legislature to pass the Statute of Frauds, and it is only in clear cases of fraud that the doctrine has been applied, cases in which the court has been persuaded that there has been a fraudulent inducement held out on the part of the apparent beneficiary in order to lead the testator to confide to him the duty which he so undertook to perform." And Lord WESTBURY said: "the jurisdiction which is invoked here by the appellant is founded altogether on personal fraud. It is a jurisdiction by which a court of equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud. Now, being a jurisdiction founded on personal fraud, it is incumbent on the court to see that a fraud, a *malus animus*, is proved by the clearest and most indisputable evidence." Much more was said by his lordship which bears on the point now under consideration; but for the present we will quote no more from the case.

In this case certainly there is not a particle of proof, nor is it pretended that there was any fraud on the part of the devisee to induce the devise; nor that she would not, if she had lived long enough, have made such a disposition of the property as is now claimed by the appellants; not in discharge of an obligation which could be enforced in a court of law or equity, but as a voluntary act, in pursuance of what she no doubt believed were the wishes of her husband.

We are therefore of opinion that the parol evidence in this case was inadmissible to alter or contradict the will, or set up a trust under the same.

We are also of opinion, that even if the evidence were admissible, it would be insufficient to prove such a trust as is claimed in this case. The will itself, certainly, shows the intention of the testator more plainly than the parol declarations made by the testator and his wife, testified to, as they chiefly are, by interested parties. The will, as we have seen, is very plainly expressed; as if the testator was careful to exclude the idea that his wife should be considered as holding the property for the benefit, ultimately, of the heirs of the two families respectively, according to the claim set up in this suit, and not for her own exclusive and absolute use. If, really, the testator had intended to give these two families, or either of them, any interest in remainder in his estate, he would

have done so expressly in his will. He would, for example, have given a moiety of his estate to his wife absolutely, and the other moiety to her for life, with remainder to his own right heirs and next of kin. That he did not plainly do so, which he could so easily have done, is strong, if not conclusive, evidence to show that he did not intend to do so. He was not taken by surprise by death. His will was well and carefully prepared, obviously by a lawyer, more than a year before his death; and is, in substance, the same with a will which he had executed seventeen or eighteen years before. It was his deliberate and cherished purpose to make it as he did; and he meant what he said; whatever may have been his wishes in regard to the distribution of any of the property which might remain unexpended or undisposed of at her death, those wishes were altogether subordinate to his main intention, to leave all his estate of which he might die possessed, both real and personal, of every description whatsoever, to his wife; and that she should own absolutely everything that he might die possessed of. Though sometimes advised to name in his will, his wishes in regard to the ultimate distribution of the property which might be left at his wife's death, he carefully avoided doing so, lest his wife might thereby be restrained and limited in some degree in the use and enjoyment of the property. If he had survived her, the property would certainly have been his absolutely, to dispose of as he pleased, and he could not have been restrained in such disposition by his heirs at law or those of his wife, upon the ground of any trust in their favor arising from the loose conversation between him and his wife or otherwise. As she survived him he intended to leave her in his place; and to give her the property and all power over it to the same absolute extent to which he would have held and enjoyed it had he been the survivor. He did not know how long she would live, nor what occasion she might have for the use of the property after his death, and therefore he gave it to her absolutely. He had perfect confidence in her, and was willing to give it to her absolutely; trusting and believing that she would do what was right when she came to dispose of of what property might remain undisposed of at her death. [The learned judge here proceeds to discuss the testimony filed in the case and to urge its unsatisfactory nature, all which we omit.]

The Virginia case to which we refer is that of *May* v. *Joynes*, *&c.*, 20 Gratt. 692, decided by this court in 1857, but not reported until 1871. The following is the marginal abstract of the case by

the reporter: "Testator says, I give to my beloved and excellent wife, subject to the provisions hereafter declared, my whole estate, real and personal, and especially all real estate which I may hereafter acquire, *to have during her life*, but with full power to make sale of any part of the said estate, and to convey absolute title to the purchasers; and use the purchase-money for investment or any purpose that she pleases; with only this restriction, that whatever remains at her death shall, after paying any debts she may owe, or any legacies she may leave, be divided as follows: there are then limitations to his children and grandchildren. *Held*, The wife takes a fee simple in the real, and an absolute property in the personal, estate, and the limitation over of whatever remains at her death is inconsistent with, and repugnant to, such fee simple and absolute property in said real and personal estate, and fails for uncertainty." ALLEN, P., delivered the opinion of the court, in which all the other judges but SAMUELS, J., concurred. The case was very ably argued by distinguished counsel, and their arguments are fully reported. They refer to all the material authorities bearing on the interesting question involved in the case, which was: whether a remainder over, limited on an express estate for life, was rendered invalid by a power of disposition given to the tenant for life for her own use over the principal of the estate, or any part of it?

We think that case was a much stronger one in favor of the limitation over than this case is. For there, the estate on which the limitation depended was an express estate for life; while here, it is a fee simple and absolute estate. There, the limitation over was expressed in the will. Here, there is no allusion whatever to it in the will. If the limitation over in that case was repugnant to the estate given to the wife, *à fortiori* the limitation over in this case was repugnant to the estate given to the wife.

If the testator had foreseen the death of his wife so soon after his death, without having time or opportunity, or being in a condition, to make a will, or had thought of such a contingency as likely to take place, he would no doubt have provided for it by his will, and disposed of the property among the heirs of both parties, according to what he knew to be the wishes of both in such an event. But he made no such provision; and whatever may have been the cause of the omission, this court cannot supply it. To do so, would be to make a will for the testator, and not to construe

and give effect to the will as made by himself. The latter is our only legitimate office. The former is beyond our power.

In every view of the case, therefore, we are of opinion that there is no error in the decree appealed from, and that it ought to be affirmed.

The foregoing opinion discusses many of the same questions involved in the case of *Dowd* v. *Tucker*, *ante*, vol. 14, p. 477. Our note to the latter case renders it improper to pass over the same grounds which we have already there sufficiently considered. But we are gratified to be able to present the profession the views of an experienced judge more in detail than was attempted in the former case. The grounds of the present decision are far more obvious and familiar to the profession than those in the former case, since every lawyer, at the present day, comprehends at first blush the general rule of law, that a will, made under a statute requiring all wills to be in writing, and executed before witnesses, cannot be controlled by any oral understanding with the testator in regard to the ultimate disposition of the estate embraced. It would, as urged by the learned judge, in his opinion in the principal case, be a virtual repeal of the statute, to allow the instrument to be enlarged, or in any way controlled, by extraneous testimony. But the exceptions to this general rule, founded upon either fraud, or trust in procuring the will, in the particular form in which it was executed, through assurances made by interested parties under it, to use the estate for the benefit of others not named in the instrument, but intended by the testator to derive a benefit through the beneficiary named in it, are far more difficult to define. These exceptions are the same, and founded upon precisely the same principles, with the similar exceptions under the Statute of Frauds. They rest upon an implied trust growing out of an attempted fraud. The principle involved is, that the courts will not allow any one to wrest the provisions of the statute, to the accomplishment of injustice, through the literal application of the terms of the same contrary to its spirit and intent. The principle is one which meets with much contradiction and criticism from those who desire to be left in possession of their ill-gotten gains; but it still maintains its ground against all the irony and reproach heaped upon it. So long as the courts base their exceptions to statutes upon the prevention of attempted frauds, the public and the profession are not likely to make any loud remonstrances, however loudly sciolists and interested parties may remonstrate. There will always be found some men in all professions ready to sacrifice justice to symmetry, but in a healthy state of public sentiment they will have few followers.

It is upon the grounds before stated that courts of equity in England have controlled even the probate of wills when fraudulently obtained: *Gingell* v. *Horn*, 9 Simons 539; Lord HARDWICKE, in *Barnesly* v. *Powel*, 1 Ves., sen. 119, 284, 287. But this will now be done, after probate, only in very extreme cases, and where otherwise there would be no remedy for the injustice otherwise perpetrated. The question is extensively discussed in *Allen* v. *Macpherson*, 1 Phill. C. C. 133, by Lord LYNDHURST, Chancellor; and the judgment affirmed in the House of Lords: 1 Ho. Lds. C. 191, where Lord LYNDHURST thus enumerates the cases in which the courts of equity will intervene in questions of construction, or where the party is named as trustee, and where the Court of Probate could afford

no adequate remedy, or where one name is fraudulently inserted in the will in the place of another intended by the testator. See 3 Redfield on Wills 59, 60, where the question is further discussed. I. F. R.

United States District Court, Western District of Missouri.

UNITED STATES *v.* ADLER & FURST.

The offence of failing to efface and obliterate the marks, stamps and brands required by law to be upon a package of distilled spirits at the time of emptying the package is complete without any intent to defraud, or any purpose to violate the law.

If a person causes a package of distilled spirits to be emptied, it is a personal duty resting upon him to see that the marks, stamps and brands thereon, are effaced and obliterated at the time the package is emptied, and responsibility for a failure to perform this duty cannot be shifted from himself by directing another to do the same for him.

The owners and operators of a rectifying establishment engaging hands, furnishing materials and receiving the profits of the business, may be said to cause the emptying the distilled spirits used in their business by those in their employ.

A principal, who causes a package of distilled spirits to be emptied by an employee, is bound to see that the marks, stamps and brands thereon are effaced and obliterated at the time the same is emptied. If he trusts the performance of this duty to an employee, he does so at his peril, and if the employee fails to do it, such failure is equally the failure of the principal.

THIS was an indictment charging that defendants did empty, or caused to be emptied, certain casks, or packages of distilled spirits, without defacing or obliterating the stamps, marks and brands thereupon, at the time of emptying thereof.

The testimony showed that defendants were rectifiers at St. Joseph; that the process of rectifying was carried on by two employees of the firm, at a house some three or four blocks away from the firm's regular place of business; that these employees, Henry Korf and Charles Jagau, did all the work of emptying, and that defendants were neither of them present except on a few occasions; that a large number of packages of spirits were received from the distillery of Edward Sheehan & Son, and emptied by these employees, and that the stamps of these packages reappeared on packages subsequently sold by Sheehan & Son to other parties.

One of the employees, Korf, stated on the witness stand that he and Jagau stole the stamps from these packages, and returned them to the distillery without the knowledge of defendants.

James. S. Botsford and *H. B. Johnson*, for the United States.

Chester H. Krum and *Jeff. C. Chandler*, for the defendants.